

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NORTH SHORE AMBULANCE
AND OXYGEN SERVICE, INC.**

Employer

and

Case 29-RC-185400

**LOCAL 726, INTERNATIONAL,
UNION OF JOURNEYMEN AND
ALLIED TRADES,**

Petitioner

**EMPLOYER, NORTH SHORE AMBULANCE AND OXYGEN SERVICE
INC'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE**

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I. SUMMARY OF ARGUMENT.

This Request for Review is submitted, *inter alia*, because substantial questions of law and policy are raised by the Regional Director's (the "Director") departure from officially reported National Labor Relations Board ("Board") precedent, and established Board election procedures, in his Decision on Objections and Certification of Representative ("Decision"). The Decision departs from Board precedent in two respects: (1) the Director overruled North Shore Ambulance and Oxygen Service, Inc.'s ("North Shore") objection to the Board Agent's decision to permit a non-employee Business Agent of Local 726, International Union of Journeymen and Allied Trades (the "Union") to serve as the Union's election observer; and (2) the Director overruled North Shore's objection to the Union's improper electioneering within twenty four (24) hours of the scheduled election. Accordingly, North Shore respectfully requests that the Board overturn the Director's decision and direct a second election.

North Shore is entitled to the relief it seeks for several reasons. First, the Stipulated Election Agreement (the "Agreement") expressly limits observers to "non-supervisory employee" observers. In direct contravention of the Agreement, the Board Agent permitted the Union's Business Agent, Nicholas Dippolito ("Dippolito"), who was not an "employee," to serve as the Union's observer. As a result, in direct contravention of the NLRA's mandate that elections be "free and fair," the Board Agent's decision forced employees to face a high-ranking union official – a clear partisan – as each entered the voting room and stated their respective name. Indeed, as word of Mr. Dippolito's presence in the voting place circulated among the employees, some may have chosen to cast a ballot in favor of the Union. As well, the uncontroverted evidence submitted by North Shore in support of its objections established that, within twenty four (24) hours of the election, the Union engaged in impermissible

electioneering by subjecting assemblies of employees to campaign speeches. For these reasons, the election, which was required to be held under “laboratory conditions,” was tainted with the Union’s improper influence. Accordingly, as will be demonstrated herein, the decision of the Regional Director must be overturned and the Board should direct a second election.

II. STATEMENT OF THE CASE.

North Shore provides emergency medical services and medical transportation to public and private hospitals and healthcare facilities throughout the New York metropolitan area.

On October 3, 2016, the Union filed an RC petition seeking to hold an election to determine if it would be certified as the collective bargaining representative for employees in the following collective bargaining unit:

All full time and regular part-time ambulette drivers and helpers employed by North Shore at its College Point, New York facility, but excluding all other employees, including ambulance drivers, clerical, guards, and supervisors as defined by the National Labor Relations Act.

After the Union and North Shore entered into a stipulation governing the election, an election by secret ballot was conducted on October 28, 2016. Prior to the election, the Union stated that it would designate an employee of North Shore to serve as its observer. North Shore designated a non-supervisory employee, who was not a member of the proposed bargaining unit, to serve as its observer. Shortly before the election was scheduled to commence, Mr. Dippolito advised the Board Agent that he could not find an employee who was willing to serve as an observer. As a result, Mr. Dippolito requested the Board Agent’s permission to serve as the Union’s election observer. Over North Shore’s objection, the Board Agent permitted Mr. Dippolito to designate himself as an observer and the election proceeded.

The tally of ballots prepared at the conclusion of the election revealed that of the

approximately twenty (20) eligible voters, eleven (11) votes were cast for the Union, six (6) votes were cast against the Union, with two (2) challenged ballots.

On November 4, 2016, North Shore timely filed its Objections to the Conduct (“Objections”) of the Election. North Shore raised three objections to the conduct of the Election: (1) North Shore objected to the Board Agent’s decision permitting Mr. Dippolito to serve as an observer; (2) North Shore objected to the Union’s improper electioneering within twenty four (24) hours of the election; and (3) North Shore objected to the Union’s improper coercion of North Shore’s employees.

In support of its Objections, North Shore submitted affidavits from several employees describing the Union’s conduct in advance of the election. One employee, Claudio Sanchez, affirmed that within twenty four (24) hours of the election, Mr. Dippolito approached a group of proposed bargaining unit employees.

Although Mr. Sanchez’s affidavit makes clear that Dippolito approached a group of assembled employees for the purpose of electioneering within twenty four (24) hours of the election, and although the Board Agent permitted the Union to place a Board Agent as its observer, the Director overruled North Shore’s Objections in a Decision issued on November 13, 2016 without holding a hearing.

III. ARGUMENT AND ANALYSIS.

A. **The Union’s Observer Was Not An Employee – Of Any Employer –And His Service As An Observer Was a Direct Violation of The Stipulated Election Agreement And The NLRA’s Mandate That Elections be Conducted as Free and Fair**

The stipulated election agreement – signed by the parties and approved by the Regional Director – is perfectly clear that each observer must be a non-supervisory “employee.” The

Agreement is the only document which reflects the basis for the election and all the specific, mutually agreed upon and approved terms of the election. The Board Agent could no more permit someone other than a “non-supervisory” employee to serve as an observer than she could ignore the voting times set for the in the Agreement, or unilaterally change the voting location. By departing from the terms of the election Agreement, and by permitting a partisan to serve as an observer, the Board Agent not only ensured that the Agreement was breached, she also deprived North Shore’s employees of their right to a free and fair election.

I. The Board Agent Ensured That The Agreement Was Breached

The terms of the election are set forth in the Agreement. The rules set forth therein for observers appear in Paragraph 10 of the Agreement:

“10. Observers. Each party may station an equal number of authorized non-supervisory employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.”

The parties agreed, and the Director approved, that observers each be “non-supervisory” and an “employee.” It is undisputed that Mr. Dippolito was not an employee. The Union understood this rule: the Union advised the Board Agent and North Shore prior to the election that it intended to use an employee as its observer. After Mr. Dippolito advised that he was unable to find a substitute, he put himself forward as the Union’s observer.

The guiding principle that all parties to an election, including the Board and its agents, will be bound to observe express terms in election agreements is a longstanding one. It is rooted in the significant policy consideration that “parties are far less likely to enter into agreements if they are worth little more than the paper they are printed on.” *Community Care Systems*, 284 NLRB 1147, 1147 (1987). In consequence, it was held in *Summa Corp. v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980) that:

“A party to an agreement authorizing a consent election is entitled to expect that other parties and agents of the Board will diligently uphold provisions of the agreement that are consistent with the Board policy and are calculated to promote fairness in the election. [Citations omitted.]”

Summa, 625 F.2d at 295.

As a stipulated election agreement is “binding on the parties,” *Berman Steel Co.*, 115 NLRB 247, 249 (1956), it is axiomatic that its terms are also binding on the Board which is charged with enforcing its terms, and not just one of its terms, but all of its terms. Only in situations where the terms of the election agreement are unclear or ambiguous, and the intent of the parties cannot be ascertained from examination of those express terms, does the Board proceed beyond those express terms by attempting to interpret them. *S & I Transportation*, 306 NLRB 865 (1992); *NLRB v. Detective Intelligence Service*, 448 F.2d 1022, 1025 (9th Cir. 1971); *New England Lumber Division of Diamond v. NLRB*, 646 F.2d 1, 2-3 (1st Cir. 1981).

Here there is no ambiguity. The Agreement explicitly provided that the Union could only designate an employee to serve as an observer. Accordingly, Mr. Dippolito was plainly ineligible under the terms of the Agreement. The Employer is absolutely entitled to have the election to which it agreed, run in accordance with the terms to which it agreed, The Board Agent was required to enforce the Agreement and preserve the contractual rights embodied therein. In overruling North Shore’s objections, the Director approved the Board Agent’s actions, which had the effect of essentially re-writing the parties’ election agreement. With all due respect, this is something that the Board Agent, the Director, and the Board simply do not have the authority to do. For these reasons, North Shore respectfully requests that the election results be set aside, and that the Board direct a second election.

II. Permitting Mr. Dippolito To Serve As An Observer Ensured That The Election Was Neither Free Nor Fair.

In addition to breaching the Agreement, the Board Agent's decision to permit the Union's Business Agent to serve as an observer had a fundamental and detrimental effect on the conduct of the Election. In resolving North Shore's objections, the Director held that permitting a non-employee Union official to serve as an observer did not warrant setting aside the results of the Election unless the observer engaged in misconduct. It is well settled that an employer may not designate a supervisor, or an individual closely associated with management, to serve as an election observer. Although the Board has attempted to draw a distinction when it comes to non-employee Union officials, and has recently ruled that they may be permitted to serve as observers, these individuals, by their mere presence at the polling place, have the ability to unduly influence and coerce voters. Accordingly, if the Board is truly concerned about protecting employees' right to a free and fair election, it must ensure that the polling place is devoid of any individuals who could assert undue influence on behalf of the employer or the Union.

Section 7 of the NLRA guarantees employees the basic right to choose whether or not they wish to be represented by a labor organization for collective bargaining purposes. The requirement that elections be conducted in a timely manner that also gives effect to employee choice is sacrosanct. Indeed, this principle is set forth in the NLRA, which states that the Board, "in each case" should "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." *See* Sec. 9(a).

Board conducted elections support this right by providing a forum where employees may express their representation choices via secret ballot. Due to the overwhelming importance of

such process, the NLRA mandates that the Board seek an election environment in which employees may freely and fairly cast votes reflecting their desires. Accordingly, elections must be conducted under ideal “laboratory” conditions to ensure that the neutrality of the election process is preserved. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

Observers play an important role in the election process by potentially “challenging voters and generally monitoring the election process.” *NLRB v. Frontier Hotel*, 625 F.2d 293, 295 (9th Cir. 1980). In order to maintain the desired neutrality and integrity of elections, the NLRB has established guidelines on who may properly serve as election observers. Thus, for example, the NLRB has held that supervisors as well as other employees “closely associated with management” may not serve as observers. *Paragon Rubber Co.*, 7 NLRB 965 (1938); *International Stamping Co.*, 97 NLRB 921 (1951). Similarly, nonemployees may be used as observers only if “reasonable under the circumstances.” *Kelley & Heuber*, 309 NLRB 578 (1992). As well, in further recognition that elections must be kept free from partisan influence, the NLRB’s field manual provides, in pertinent part: “a union official may serve as an observer if he/she is also an employee of the employer.” CHM § 11310.2.

In keeping with these principles, the NLRB has consistently held that a party’s agents in a place employees must pass in order to vote constitutes objectionable conduct sufficient to set an election aside. See *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (presence of two supervisors in areas employees had to pass in order to vote was objectionable); *Performance Measurements Co., Inc.*, 148 NLRB 1657 (1964) (presence of an employer’s president near door to the election area was objectionable).

In *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C.Cir. 2001), the D.C. Circuit faulted the Board for its unexplained departure from *Electric Hose & Rubber* and *Performance*

Measurements where union agents were continually present within 20 feet of a building entrance employees had to enter to reach the polling place. The Court held that the mere presence of union agents within 20 feet of the polling place, “constituted conduct of such a nature that it substantially impaired employees’ exercise of free choice—even if the agents did not actually talk to an employee.” In *Nathan Katz Realty, LLC*, 251 F.3d at 993. Thus, as the DC Circuit concluded, the union agents did not have to engage in misconduct or electioneering, their mere presence outside of the polling place was sufficient to destroy the “laboratory” conditions under which the election was required to be held.

Here, the Union did not merely place an agent outside of the polling place, it was permitted to place one right next to the ballot box. If the presence of union agents within 20 feet of the polling place is impermissible, as the DC Circuit concluded in *Nathan Katz*, it is much more coercive and impairing of free choice to permit the Union to position itself *in the polling place* as a Board approved observer, closely monitoring every single voter mere seconds before he or she marked and cast a ballot. As *Nathan Katz* held that it is improper for a union agent to be “continually present in a place employees have to pass in order to vote,” *Nathan Katz Realty, LLC*, 251 F.3d 993, no one is more “continually present” in such a place than an election observer.

The Director cites *Longwood Security Services, Inc.*, 354 NLRB 50 (2016) and the cases it relies upon in which elections were upheld notwithstanding the presence of union officials as observers. However, the cases *Longwood* relies upon all pre-date *Nathan Katz Realty*,¹ and in *Longwood*, the Board did not consider the inconsistency between *Performance Measurements, Electric Hose and Rubber*, and *Nathan Katz* on the one hand, and permitting union agents to

¹ See e.g. *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994); *Shoreline Enterprises of America*, 114 N.L.R.B. 716, 718-719 (1955).

serve as an election observers on the other. Indeed, the Director held that, in this case, a Union official could serve as an observer as long as the Union official did not commit any misconduct. However, as *Nathan Katz* makes clear, the mere presence of a Union observer in a “place which employees must pass” is sufficient to obliterate the laboratory conditions under which an election must be conducted. No showing of misconduct or prejudice is required.

Of course, the Director’s conclusion is based upon a principle, restated in *Longwood*, that there should be a different rule for employer agents and union agents. Specifically, the former should be prohibited from serving as an election observer and the latter should not. This rationale is based upon the Board’s belief that employers wield power over their employees and unions do not. This principle is erroneous and inconsistent.

Indeed, in *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) (“*Randell II*”), the Board pointed out that “unions also have ample means available to them to punish employees:”

Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them...The opportunities for and means of reprisal available to unions may differ from those available to employers, but they are no less real or intimidating.

See Randell II, 347 NLRB at 594-595.

The Board recognized the coercive effect unions can have on a bargaining unit long before *Randall II* was decided. In *Butera Finer Foods, Inc.* 334 NLRB 11 (2001), the Board held that a non-employee union official could not serve as an observer in a decertification election. In reaching this conclusion, the Board observed that:

“A bargaining representative is the exclusive representative of employees in dealing with an employer over terms and conditions

of employment. At the decertification election, the employees are being asked whether to oust that representative.”

See Butera, 334 NLRB at 44.

Accordingly, the Board held that “because employees have accumulated experience with their operations,” “employees may be unduly influence by the actual physical presence of nonemployee agents of the incumbent union at the polling site.” *Id.*, at 43.

As observed in *Randell II*, a union’s coercive and reprisal powers are not limited to its potential authority as a collective bargaining representative. Indeed, evidence of abuses by unions of their power over employees during organizational campaigns motivated Congress to establish union unfair labor practices in the Taft Hartley Act. *See Randell II*, 347 at 594. Accordingly, in the case of elections, results must be set aside if conduct occurred that “reasonably tends to interfere with the employees’ free and uncoerced choice in the election.” *Baja’s Place*, 268 NLRB 868 (1984). As *Nathan Katz* makes clear, this standard is met where union agents are “continually present” in a place where employees “must pass” to vote even if the agents remain motionless and silent. *Nathan Katz*, 251 F.3d at 993.

Thus, in light of *Butera*, *Randall II*, and *Nathan Katz*, the Board’s reasoning in *Longwood* and the cases upon which *Longwood* relies, is misguided. These cases make it clear that, in the case of union observers in a representative election, there cannot be a separate standard for union and employer observers.² The Board has correctly recognized that in a decertification election,

² In support of applying different standards to employer-agent observers and union-agent observers, the Board noted in *Longwood* that different standards are applied to unions and employers when it comes to home visits and pre-election polling. However, home visits and polling are fundamentally different from stationing a party’s agent at the threshold of the voting booth. As the Board explained in *Randell II*, “[d]irect personal solicitation and polling are the primary means by which unions effectuate the policies of the Act by affording employees the right to ‘self organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.’” *Randell II*, 347 NLRB at 595. As home visits and polling provide, “natural occasions for bilateral discussion and noncoercive attempts to persuade,” they are organizational tools. The Board in *Randell II* distinguished such activities from photographing employees, which does not play the same central role in employee

an extant union representative is viewed as having a potential “coercive effect” upon workers. As the Board has repeatedly observed a union who seeks to represent employees has just as much ability to threaten, coerce, and intimidate voters. Indeed, in *Randell II*, the Board observed:

“In the context of an election campaign, the union seeks to become (or remain) the representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union’s efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer’s solicitation to reject union representation.”

Randell II, 347 N.L.R.B. at 591.

As the affidavits submitted by North Shore make clear, Mr. Dippolito was meeting with North Shore’s employees up until within twenty four (24) hours of the election. As a business agent, his job is one of coercion; he must convince a majority of bargaining unit employees to vote in the Union’s favor. Although the Union intended to use an employee as an observer, it could not find one who was willing to serve. At this point, when the Union was left without an observer through no fault of North Shore, Mr. Dippolito put himself forward. In permitting Mr. Dippolito to serve as an observer, the Board placed the individual who was responsible for campaigning and coercing North Shore’s employees right next to the ballot box. As *Nathan Katz* makes clear, a non-employee union agent cannot place themselves in a place where “employees must pass” to vote. This means that Mr. Dippolito, a pure partisan, could not stand next to the voting booth. Moreover, as Mr. Dippolito undoubtedly spent a large amount of time campaigning and coercing North Shore’s employees, he did not have to say or do anything

self-organization.” *Id.*, at 596. Using party agents as election observers is even more distinguishable from organizational activities such as home visits and polling: by the time employees are about to vote, all organizing has ended, and the Board’s concern shifts to ensuring that “[t]he final minutes before an employee casts his vote should be....as free from interference as possible.” *Milchem, Inc.*, 170 NLRB 362 (1968).

during the election to have a coercive effect. His mere presence *in the polling place* was enough. Indeed, each employee cast their vote under Mr. Dippolito's gaze. Thus, by permitting Mr. Dippolito to serve as an observer, the Board Agent effectively destroyed the integrity of the election process. Therefore, the results of the Election should be set aside and the Board should direct a second election.

B. As the Union Engaged in Impermissible Campaign Speeches Within Twenty Four (24) Hours of the Election, the Election Results Must Be Set Aside

As the presence of Mr. Dippolito as an observer mandates that the Election be set aside, it is not necessary for the Board to proceed further. However, in the alternative, the results of the Election must be set aside because the Union subjected assemblies of employees to campaign speeches within twenty four (24) hours of the Election.

It is well settled that employers and unions are prohibited from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. " *Peerless Plywood*, 107 NLRB 427 (1953). Violation of this rule is grounds for setting aside the results of an election. *Id.*

For the purposes of the *Peerless Plywood* rule, an "assembly" of employees does not have to be particularly large. Indeed, in *Shirks Motor Express Corp.*, 113 NLRB 753 (1955), the Board ruled that an "assembly" of individuals of individuals can consist of as few as three employees. *Shirks*, 113 NLRB at 755.

The Director overruled North Shore's objection to the Union's violation of the *Peerless Plywood Rule*, based upon his belief that North Shore's employees were not subjected to campaign speeches while "assembled." However, the situation here is distinct from others where a union official briefly urged individual voters to vote for the union as they entered and left the employer's facility, see *Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833 (1998); or

where union representatives shouted to employees in the lobby leading to the polling area about a “victory party” to be held after the election, see *Mediplex of Milford*, 319 NLRB 281 (1995).³

Here, as Mr. Sanchez’s affidavit makes clear, Mr. Dippolito approached a group of North Shore’s drivers, on company time, and within twenty four (24) hours of the election and subjected them to union solicitation. Contrary to the Director’s conclusion, these employees were “assembled” because Mr. Dippolito approached them as a group, and cajoled them into listening to his campaign speech. For this reason, Mr. Dippolito’s conduct violated the *Peerless Plywood* rule and the election must be set aside.

V. CONCLUSION.

Accordingly, for the foregoing reasons North Shore respectfully requests that the Board grant its Request for Review of the Regional Director’s Decision.

DATED: December 15, 2016

KAUFMAN DOLOWICH & VOLUCK, LLP

A handwritten signature in blue ink, appearing to read 'J. A. Meyer', is written over a horizontal line.

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NORTH SHORE AMBULANCE AND OXYGEN
SERVICE, INC.

³ Under the rule established in *Nathan Katz* which prohibits union agents from placing themselves in a “place where employees must pass,” the conduct of the unions in *Mediplex* and *Comcast*, would have been impermissible.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Employer, North Shore Ambulance and Oxygen Service Inc's Request for Review of the Regional Directors' Decision On Objections and Certification of Representative was served on the Union and the attorney for the union at their respective business addresses indicated below:

Nicholas Dippolito, Business Agent Local 726, IUJAT 93 Lake Ave, Suite 103 Danbury CT 06810	Gary P. Rothman, Esq. Attorney for the Union Rothman Rocco Laruffa, LLP 3 W. Main Street, Suite 200 Elmsford, NY 10523
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via ☐ hand delivery, ☐ email, ☐ facsimile, ☒ overnight-next day delivery, and/or ☐ First Class U.S. Mail with proper postage prepaid, at or before the hour of 5:00 p.m., on **December 15, 2016.**


Jeffery A. Meyer, Esq.

Sworn before me this 15th Day of December 2016



Notary Public

MATTHEW ERIC COHEN
Notary Public State of New York
No. 02CO6225841
Qualified in Nassau County
Commission Expires 20 18

4827-0292-8958, v. 2